Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

HARLOW CORPORATION,
*Petitioner*,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR
and NINA HATFIELD, ACTING DIRECTOR,
BUREAU OF LAND MANAGEMENT,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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April 24, 2003

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## QUESTIONS PRESENTED FOR REVIEW

The regulatory policies and processes of the Department of the Interior (DOI) and Bureau of Land Management (BLM) for administration of the public land and mining laws, including the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C.§ 28f-k, fail to distinguish valid existing mining claims with valuable mineral discoveries and unperfected mining claims. As a result, Fifth Amendment due process protections are not extended to valid existing unpatented mining claim property rights established under the 1872 General Mining Laws as amended, 30 U.S.C. § 22 et seq.

1. Are valid existing mining claim property rights protected by the Fifth Amendment from summary DOI, BLM and Department of Agriculture Forest Service processes which diminish and terminate valid existing mining rights?

2. Did DOI fee payment and forfeiture administrative processes give timely and clear notice meeting Fifth Amendment due process requirements to mining claim owners?

3. Should "valid existing rights" be the proper equitable estoppel criteria to be applied by the DOI in mining claim cases?

## PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioner, Harlow Corporation was the Plaintiff-Appellant in the District of Columbia Court of Appeals proceedings.

There is no parent or publicly held company owning 10% or more of Harlow Corporation's stock.

Gale Norton, Secretary of the Interior who was substituted for Bruce Babbitt in the District of Columbia District Court proceedings, and Kathleen Clarke, Director, Bureau of Land Management were the Defendant-Appellees in the District of Columbia Court of Appeals proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

HARLOW CORPORATION, Petitioner

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR and NINA HATFIELD, ACTING DIRECTOR, BUREAU OF LAND MANAGEMENT, Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Petitioner, Harlow Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia, entered in the above-entitled proceeding on January 24, 2003.

## OPINIONS BELOW

The Judgment of the Court of Appeals for the District of Columbia is reprinted in Appendix A.

The unreported Memorandum Opinion of the District Court for the District of Columbia is reprinted in Appendix B.

The Decision of the Department of the Interior Board of Land Appeals, Harlow Corporation, 135 IBLA 382 is reprinted in Appendix C.

## JURISDICTION

The Petitioners filed suit in the District Court of the District of Oregon on June 25, 1996, pursuant to 28 U.S.C. §§1331, 1631, 2201 and 5 U.S.C. §§ 701-706, for review of the decision of the Department of the Interior Board of Land Appeals decision decided June 7, 1996 affirming BLM Alaska State Office decisions declaring Harlow Corporation's four mining claims forfeited.

The matter was removed to the District Court of the District of Columbia by transfer order on February 18, 1997.

On July 24, 2001, the District Court of the District of Columbia granted the Government's motion for summary judgment and issued it's Final Order and Judgment.

On September 18, 2001, Harlow Corporation filed its Notice of Appeal to the Court of Appeals of the District of Columbia Circuit, pursuant to 28 U.S.C. §§ 1291 and 2106 and Article II § 2 of the United States Constitution.

On January 24, 2003, the Court of Appeals for the District of Columbia Circuit issued a Judgment ordering that the District Court's grant of summary judgment to the Secretary of the Interior be affirmed.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause; APA, 5 U.S.C. §§ 706-708; the United States Mining Laws, 30 U.S.C. §§ 21a to 29, 35, 612, 613; Federal Land Policy and

Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C.§1744; Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Omnibus Budget Reconciliation Act of 1993 (Omnibus Act), Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C. § 28f-k; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Omnibus Consolidated and Emergency Applications Act of 1998, Pub. L. No. 105-277; Department of Agriculture, Forest Service regulations, 36 CFR §§228; 251, DOI regulations, 43 CFR §§ 4.410, 451-2; DOI BLM regulations, §§ 3809, 3833; Secretary of the Interior Secretarial Order 3163 of March 2, 1993.

## STATEMENT OF THE CASE

## 1872 MINING CLAIM PROPERTY RIGHTS

Authority conferred by the 1872 General Mining Laws 30 U.S.C. § 22 et seq., as amended, enables citizens to enter and prospect on federal lands open to mineral location and, upon discovery of valuable minerals, to locate unpatented mining claims.

To establish, hold, conduct mining operations and patent mining claims, mining claim owners must locate and actively maintain mining claims under a number of federal and state laws.

"Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26. As long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without

paying any royalty to the United States, 30 U.S.C. § 28.

## DEPARTMENT OF THE INTERIOR JURISDICTION AND DUE PROCESSES FOR DETERMINING MINING CLAIM VALIDITY

For over 100 years, the Secretary of the Interior has had primary jurisdiction to determine mining claim validity under the 1872 General Mining Laws, 30 U.S.C. § 22 et seq. This jurisdiction includes determining whether mining claims have been properly located under the federal and state mining laws and perfected with valuable mineral discoveries under DOI rules for mineral patent and other mining claim validity purposes. 30 U.S.C. § § 29, 35.

Hearing procedures afford parties in cases involving contested questions of fact to have a hearing and determination by an administrative law judge as to the sufficiency of mining claim locations and the discovery of valuable minerals. 43 CFR § 4.420.

Appeal procedures afford parties adversely affected by mining claim validity decisions of the BLM or of an administrative law judge to appeal to the Interior Board of Land Appeals (IBLA), 43 CFR § 4.400.

## MINING LAW AMENDMENTS AFFECTING MINING CLAIM PROPERTY RIGHTS — 1955 LIMITATIONS ON MINING CLAIM SURFACE RIGHTS

In 1955, Congress established United States rights thereafter to manage and dispose of vegetative surface resources on unpatented mining claims located after the date of the Act (July 23, 1955). 30 U.S.C. § 612.

The 1955 Act provides a process for publication, filing of verified statements and hearings to determine the validity and effectiveness of any prior right or title to, or interest in or under such mining claims. 30 U.S.C. § 613.

## 1974 FOREST SERVICE AND 1980 BUREAU OF LAND MANAGEMENT REGULATION OF MINING CLAIM OPERATIONS AND ACCESS AFFECTING MINING CLAIM PROPERTY RIGHTS

In 1974, the Department of Agriculture issued Forest Service regulations, 36 CFR § 228, requiring mining claim owners and operators to file notices of intent for planned mining operations and to file plans of operations for operations that exceed defined surface resource impacts. 39 FR 32029, Sept. 4, 1974.

In 1980, the DOI issued the first BLM regulations, 43 CFR § 3809, requiring the filing of notices for planned mining operations with further requirements to file plans of operations that exceed defined surface resource impacts. 45 FR 82934, Dec. 17, 1980.

A valid mineral location and an exposure of a valuable locatable mineral discovery establishes rights to disturb surface resources and to remove minerals for a profit. 30 U.S.C. 26. The Forest Service and BLM, under their respective plan of operations mining claim regulations, provide mining claim operating conditions to minimize environmental impacts and surface resource destruction until issuance of patents. 30 U.S.C. § 612.

Forest Service regulations, 36 CFR § 251.82, provide an appeal process for appeal of written plan of operations

decisions of Forest Service line officers through Forest Supervisors to the Regional Foresters. BLM regulations, 43 CFR § 3809, provide appeals rights to State Directors and then to the IBLA.

## 1976 MINING CLAIM RECORDATION WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

In 1976, Congress enacted the FLPMA, 43 U.S.C. 1744, and BLM regulations, 43 CFR § 3833. The Act and regulations set an automatic annual December 31 forfeiture deadline for unpatented mining claim owners to file annual assessment work or notice of intention instruments with the BLM.

FLPMA did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, as opposed to perfected or unperfected mining claims on unreserved lands that could be relocated.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

## 1992 $100 ANNUAL RENTAL FEE PAYMENTS WITH FEE WAIVER OPTION, WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

On October 5, 1992, Congress enacted the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374 30 U.S.C. § 28f-k.

The Act was a combination $100 rental fee payment and fee waiver filing forfeiture statute. An explicit, statutory forfeiture deadline of August 31 was set for paying rental fees or filing qualified fee waivers for the 1992 and 1993 assessment years, provided owners performed mining claim assessment work and filed proof of assessment work in compliance with FLPMA.

The Act did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, and perfected or unperfected mining claims on unreserved lands that could be relocated.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

## 1993 $100 ANNUAL MAINTENANCE FEE PAYMENTS WITH FEE WAIVER OPTION, WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act (Omnibus Act) Pub. L. 103-66, 107 Stat. 312, 43 U.S.C. § 28f-k. The Act replaced the 1992 rental fee statute. The 1993 Omnibus Act repeated the 1992

statute's August 31 rental fee forfeiture deadline for paying a $100 maintenance fee per mining claim. No forfeiture deadline was set for filing fee waivers.

The Act did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, and perfected or unperfected mining claims on unreserved lands that could be relocated.

On August 30, 1994, Secretary of the Interior Bruce Babbitt issued amended BLM regulations to implement the Omnibus Act. The Secretary set August 31 as the regulatory annual forfeiture deadline for filing fee waivers. The only legal notice received by mining claim owners of the Omnibus Act and BLM regulation requirements and deadlines was enactment of the Act and publication of the regulations in the Federal Register.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

## PATENT RIGHTS MORATORIUM

On March 2, 1993, Secretary of the Interior Bruce Babbitt issued Secretarial Order No. 3163, suspending first-step processing and publication of mining claim applications for mineral patents. (App. D-10).

At the same time, Secretary Babbitt delayed second-step approval of final certificates for the issuance of patents. The Secretary only issued patents upon federal court order.

*Independence Mining Company v. Babbitt*, 885 F.Sup. 1356 (D. Nev 1995), aff'd, 105 F.3d 502 (9th Cir. 1997).

In 1994, Congress enacted a moratorium on filing of applications for mineral patents. Department of the Interior and Related Agencies Appropriations Act of September 30, 1994, P.L. 103-332, 108 Stat 2499 §112. In 1996, Congress extended the moratorium. Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

## ADMINISTRATIVE DUE PROCESS

The DOI relied on the Omnibus Act, the BLM regulations and media releases to provide notice of the Act's requirements and forfeiture deadline.

No administrative notice, billing or supplemental information processes were used to inform mining claim owners of the Omnibus Act's forfeiture statute and its complex interrelationship with the operation of the mining laws and FLPMA.

## EQUITABLE ESTOPPEL

IBLA adopted equitable estoppel rules that bar mining claim owners equitable relief unless they are able to prove that affirmative misconduct of an official or employee was the reason that equitable relief is necessary. In the absence of any misrepresentation or concealment of a material fact, IBLA held that no basis existed for affirmative misconduct upon which a claim of estoppel could be based. *Harlow Corporation, supra*, 135 IBLA 382, at 387-388.

Except where equitable relief was given to owners of

forfeited claims located on reserved lands, summary forfeiture terminated all on-going operations and mining claim owners lost valuable mineral discoveries and investments.

## HARLOW'S MINING CLAIMS AND MINING OPERATIONS

In 1988, preparatory to filing application for mineral patents and commencing mining operations, Harlow Corporation participated in a validity Forest Service examination of the mining claims. The Forest Service has never released the results of this examination. (App.E-9).

On August 4, 1993, Harlow paid $800 for 1992-1993 rental fees under the 1992 Act, and on July 28, 1994 paid an additional $400 for 1994 maintenance fees under the 1993 Omnibus Act and regulations, 43 CFR 3833. The payments were transmitted by letters in which Harlow inquired about forms and filing requirements. (App.E-10).

On May 3, 1994, Harlow filed a plan of operations and went to Alaska with a crew in late August and early September, 1995 to prepare the site and participate in a scheduled Forest Service validity examination. (App.E-10).

Harlow had invested over $100,000 to acquire the mining claims, to maintain mining rights and to expose and develop discoveries of valuable minerals on the mining claims. (App.E-10).

Harlow did not pay maintenance fees or file a certification for waiver of fees before August 31, 1995. (App.E-10). Instead, on December 27, 1995, Harlow filed an annual assessment work instrument to comply with FLPMA, 43 U.S.C. § 1744, and annual filing requirements. 43 CFR §

3833.2. At that time, Harlow also filed a certification for waiver of fees to meet the fee waiver requirements of the Omnibus Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C. § 28f-k and BLM regulations. (App.E-10).

On June 11, 1996, after receiving a BLM decision declaring the mining claims forfeited and filing an appeal, Harlow submitted $800 to pay for the maintenance fees for 1996 and 1997 assessment years. These actions showed Harlow's willingness to pay the fees in the event that the certification for waiver of fees was rejected.

## BLM, IBLA AND FEDERAL COURT ACTIONS
## BLM DECISIONS

On February 12, 1996, the BLM Anchorage State Office issued two decisions deeming Harlow's mining claims abandoned and void (i.e., forfeited) for failure to pay 1996 maintenance fees or to file a waiver of payment on or before August 31, 1995, pursuant to the Act of August 10, 1993, Pub. L. 103-66, 107 Stat. 495, and the regulation in 43 CFR § 3833. (App.C-2,3).

## IBLA DECISION

On June 7, 1996, IBLA denied Harlow's appeal and affirmed the Alaska State Office decision. IBLA rejected Harlow's claim that BLM's failure to provide notice of the $100 maintenance fee and fee waiver deadline and forfeiture provisions of the Omnibus Act of August 10, 1993, and regulations at 43 CFR § 3833, constituted a deprivation of property rights contrary to the Fifth Amendment. (App.C-7-9).

Instead, IBLA held that the 1993 Omnibus Act and

BLM regulations provided adequate notice to Harlow without BLM providing individualized notice of the Omnibus Act's requirements and deadlines. IBLA held that Harlow's prior payment under the Omnibus Act evidenced knowledge of its existence and need to inquire about its requirements. (App.C-7,9).

Harlow's equitable estoppel claim was rejected as lacking evidence showing affirmative misconduct on the part of BLM officials and employees. Harlow's 1994 letter submitting $100 per claim fee payments was ruled to be a vague inquiry which clearly did not require a response. (App. C-10,11).

## DISTRICT COURT DECISION

On July 24, 2001, the District Court for the District of Columbia issued a Memorandum Opinion upholding the IBLA decision affirming forfeiture of Harlow's mining claims, pursuant to 30 U.S.C. § 28f, et seq., and BLM regulations as not being arbitrary and capricious. (App.B-10-11).

The District Court held that the DOI regulatory August 31 deadline for filing certifications was a permissible interpretation establishing a regulatory deadline of August 31 for filing certifications for waiver of fees, even though it was a filing deadline completely omitted from the 1993 Omnibus Act, 30 U.S.C.§ 28(d). (App.B-8-10).

The court held that Harlow's July 28, 1994 letter transmitting $100 maintenance fees, "indicates that plaintiff knew of the existence of the Omnibus Act and the BLM regulations and of their need to inquire into (their) demands." (App.B-6-7).

The District Court denied Harlow's equitable estoppel claims based on an interpretation that Harlow's 1993 and 1994 letters transmitting fees were not inquiries that merited BLM response and that there was no reliance by Harlow upon BLM's failure to respond. (App.B-11).

## COURT OF APPEALS DECISION

On January 24, 2003, the Court of Appeals for the District of Columbia Circuit, in a unpublished decision, filed a Judgement affirming the District Court opinion and rejected Harlow's equitable estoppel contention as not showing intentional misconduct on the government's part and being without merit. (App.A-1-3).

## REASONS FOR GRANTING THE WRIT

The Court of Appeals ruling in this case endorsed DOI policies and administrative processes for forfeiture of mining claims under the Omnibus Act, and restriction of mining claim rights under other laws, without protection of valid existing rights.

This case provides urgent need for this Court to establish Fifth Amendment constitutional protection to prevent unnecessary and unconstitutional loss of valid existing rights. The rulings sought by Petitioner would protect valid existing rights in Petitioner's mining claims and any of the approximately 200,000 unpatented mining claims recorded with BLM containing valuable mineral discoveries. Table 3-22. Adjudication of Mining Claims Pub. L. 94-579 from October 21, 1976, through Fiscal Year 2001. USDI,

BLM Public Land Statistics 2001.[1] (App.E-7).

The DOI has made no pretense of its policies and efforts to reform the 1872 General Mining Laws through any administrative action that summarily limits and terminates mining claim rights. Several processes pertinent to this case are utilized by the DOI and Department of Agriculture to withhold constitutional property rights and protections accorded to valid existing mining claims. These processes bring agency actions in direct conflict with the Constitution.

The guidelines advocated by Petitioner would restore constitutional property protections in all statutory and regulatory proceedings affecting valid mining claims having valuable mineral discoveries.

Federal agencies request Congress to enact many laws. In requesting legislation, an agency may not focus Congressional attention upon the operation of the law which impacts both perfected valid existing rights and unperfected rights. The agency may fail to request due process provisions to protect valid existing rights. If Congress enacts laws without processes for recognition of valid existing rights, an agency may assert that there is no requirement for the agency to provide administrative processes for recognition and protection of valid existing rights.

The Omnibus Act's $100 annual maintenance fee payment and fee waiver option and automatic forfeiture operations illustrate this strategy. The Omnibus Act made no distinction for valid existing rights. Relying upon the

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1. Not in the record of this case – presented for this Court's consideration of the current circumstances.

Omnibus Act, the DOI takes the position that there is no need for administrative processes to determine and accommodate valid existing rights and no need to provide timely and clear notice of the Act's forfeiture requirements under Fifth Amendment property standards.

Results of the DOI's administration of the Omnibus Act have been striking. Harlow's mining claims and hundreds of thousands of other mining claims, some of which contained valuable minerals discoveries, were summarily forfeited by operation of the Omnibus Act. Of one million active mining claims recorded with the BLM under the FLPMA at the end of Fiscal Year 1993, all but 306,650 active mining claims had been forfeited by the end of Fiscal Year 1995. Tables 53 for 1993 and Table 3-19 for 1995. Recordation of mining claims, Public Law 94-579, from October 21, 1976. USDI, BLM Public Land Statistics 1993 and 1996. (App.E-10).

Forest Service and BLM plans of operations for regulating mining claim surface uses in effect diminish and summarily terminate valid mining claim existing rights.

In 1988, the Forest Service conducted a mining claim validity examination of Harlow Corporation's mining claims, preparatory to Harlow's commencement of mining operations and filing of an application for mineral patent under the mining laws, 30 U.S.C. § 35. (App.E-9). The Forest Service exercised its discretion and withheld results of the examination for the next five years.

In 1994, Harlow filed a new plan of operations with the hope of obtaining Forest Service approval in order to commence mining operations and to file application for mineral patent. The Forest Service scheduled an examination at the earliest time convenient to Harlow. During August and

September 1995, Harlow participated in the second Forest Service validity examination of the mining claims. Harlow was not informed of the results of this examination.

Discretionary authority of Forest Service and BLM officials to approve plans of operation gives these officials almost unfettered *de facto* control of mining claim rights to mine and remove minerals and patent mining claims. As more stringent access, land use and environmental standards are required, approving officials are given broader discretion to increase mining costs. Profits are reduced without regard to the effects in terminating valid existing rights.

Mining claim owners face economic and other uncertainties with plan of operation requirements that affect stability of mining operations. Valid existing rights can be readily diminished or terminated based upon the unregulated whim of officials and employees. Approval of plans of operations can be withheld indefinitely while mineral validity is being determined or for environmental considerations.

Plan of operations requirements may make mining operations impossible. Restrictions may be made on the mode of access based on the level of ongoing mining operations, and the level of mining operations may be restricted based on the mode of existing access. Restrictions for rare natural resources and endangered wildlife may be imposed without evidence of their existence. Administrative appeal and court review processes do not provide timely or cost-feasible alternatives for commercial mining decision making, operations and investments.

The legal dilemma presented by use of plans of operation to regulate and restrict mining operations for valid existing mining claims has gained Congressional attention.

"The struggle that has occurred with respect to the 3809 Regulations provides another example of administrative efforts to alter the requirements applicable to mining claims located under the 1872 Mining Law. The same pattern of parrying back and forth between DOI and Congress seen above occurred with respect to this issue." Randy Hubbard, "The 1872 Mining Law: Past, Present and Future?" Natural Resources & Environment, ABA Section of Environment, Energy, and Resources, page 183-184, Vol, 17, No. 3, Winter 2003.

Applications for mineral patents under the mining laws, 30 U.S.C. §§ 29 and 35, provided an avenue to escape unpatented mining claim forfeiture and regulatory surface restrictions that terminate or diminish mining claim rights. *United States v. Locke*, 471 US 84, 107 (1985). (The miners in *Locke* could have fully protected their interests against the effect of the statute by taking the minimal additional steps of patenting their claims.).

Rights to file applications for minerals patents were terminated almost 10 years ago when Secretary of the Interior Bruce Babbitt issued Secretarial Order No. 3163, March 2, 1993. (App.D-10). Later, in 1996, Congress enacted a moratorium on filing applications for mineral patents. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

Secretary Babbitt's moratorium order indefinitely suspending filing and processing of mineral patent applications resulted in lawsuits and Congressional attention.

> "The order resulted in a de facto moratorium on the issuance of mineral patents, and led to several lawsuits. It also established a pattern that has repeated itself throughout the 1990s, where DOI would take an administrative action restricting the rights of mining claimants, and Congress would react to those restrictions." Randy Hubbard, The 1872 Mining Law:Past, Present and Future?" Natural Resources & Environment, ABA Section of Environment, Energy, and Resources, page 151, Vol, 17, No. 3, Winter 2003.

Restoring protections for valid existing mining rights would remedy other problems with the administration and adjudication of the federal land and mining laws.

DOI, BLM and Forest Service officials and employees would end unprofessional adjudication, payment billing, notice and information practices. The present agency practices do not befit agencies with long histories of honorable service to the public and citizens doing business with the agencies.

IBLA and the District Court's excuse for BLM's failure to respond to Petitioner's requests for information in 1993 and in 1994 concerning the Omnibus Act conflicted with well-established Government standards. Harlow's inquiries showed misunderstanding of the essential requirements needed to avoid forfeiture of its valuable mining claims.

The mining laws and Constitution never anticipated that at some future time a Secretary of the Interior would initiate policies, processes and practices that would summarily terminate valid existing rights rather than validate and give effect to such rights.

> "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 US 450, 460 (1920).

Actions of the DOI, BLM and the Forest Service employees that have failed to give effect to valid existing rights are clearly unlawful and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with constitutional right. Such actions should be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(1)(2)(A)(B).

On the one hand, citizens have been invited by the United States mining laws to enter available public lands to establish valid existing rights to locate, mine, remove and patent valuable minerals. The DOI is entrusted with responsibility to promote and protect these rights. On the other hand, the DOI has instituted an all-out program to cut off mining rights. Such a pattern and practice is tantamount to conspiracy to deprive citizens of their rights — actions which are prohibited under 28 U.S.C. § 241.

Unless valid existing rights are restored, all mining claims may now be summarily taken without Fifth Amendment due process protection. Examination of all of the relevant BLM and Forest Service mining claim actions reveal cumulative regulatory diminishment of valid existing mining claim rights to mine and remove minerals to such an extent

that mining profits may no longer be possible.

The DOI also completely ignores valid existing rights as an important factor in providing equitable relief to owners of forfeited mining claims that cannot be relocated. Presently, the DOI requires persons to prove that affirmative misconduct on the part of an official or employee caused mining claim forfeiture. *Harlow Corporation, supra,* 135 IBLA 387-388. (App.C-10-11).

Replacing the present equitable estoppel criteria with the requirement for owners to assert and prove valid existing rights will help balance DOI policies with the policies underlying the rights granted by the 1872 Mining Laws and Fifth Amendment due process guarantees which implicate mining claim property rights.

Petitioner has prepared a short outline of issues and subject matter that will be covered in Petitioner's brief in the event that this Court decides to accept this Petition.

## FORFEITURE AND RESTRICTION OF VALID MINING CLAIMS WITH VALUABLE MINERAL DISCOVERIES VIOLATES THE FIFTH AMENDMENT

If this Petition is granted on this issue, Petitioner's brief will analyze:

1. The national importance under the Minerals Policy Act, 30 U.S.C. § 21a, for the Secretary of the Interior to provide regulations which do not disrupt the economic stability of large and small mining enterprises by restricting and taking valid existing mining claim rights.

2. Pertinent statutes and cases establishing historic and

current statutory and constitutional property rights conferred by the 1872 General Mining Laws, as amended, 30 U.S.C. § 22 et seq., to mine and remove minerals and for patenting valid existing mining claims with valuable mineral discoveries. Beginning with *Forbes v. Gacey*, C.C. Nev. 1877, Fed. Cas. No. 4, 924, affirmed 94 US 762, 766-767, the concept of valid existing rights, including state taxation and lien filing against valuable mining claims that have not been patented, still survives to the present day.

DOI authority to determine valid existing rights based on a discovery of valuable minerals which establish rights in unpatented mining claims to mine, remove and patent mining claims upon discovery of valuable minerals. *Cameron v. United States, supra*, 252 US at 459; *Best v. Humboldt Placer Mining Co,*. 371 US 334, 335-336 (1963); *United States v. Coleman*, 390 US 599, 602 (1968). "They are property in the fullest sense of the word, and their ownership, transfer and use are governed by well-defined code or codes of law" *Forbes v. Gacey, supra*, at 767. Discoveries must exist at the time of location and at the time of determination. *Andrus v. Shell Oil Co., Colo.*, 446 US 657 (1980).

3. Fifth Amendment conflicts raised by multiple statutes, BLM and Forest Service regulations and administrative processes that operate to restrict and summarily forfeit valid existing rights.[2]

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2. The 1976 Federal Land Policy and Management Act, 43 U.S.C. § 1744, Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-381, 106 Stat. 1374, Omnibus Budget Reconciliation Act, 30 U.S.C. 28f-k, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996);

4. The policy conflict between regulation of mining claim rights into extinction and the Fifth Amendment prohibition against taking private property without just compensation. This Court has ruled that the filing requirements and forfeiture provisions of the 1976 FLPMA, 43 U.S.C. § 1744, met due process standards and constituted reasonable regulation of economic interests that may adversely affect mining claims. *United States v. Locke, supra*, 471 US at 105.

Petitioner's brief will examine the relevant circumstances and extent to which DOI, BLM and Forest Service actions diminish and terminate valid existing rights under Fifth Amendment takings criteria. *Penn Central Transp. Co. v. New York City*, 438 US 104, 124. (1978). While mitigation of public harm is an important consideration in takings cases, *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1018 (1992), discretion given to the Secretary under SMCRA may deny permission for operations based upon a whole new set of criteria. *The Stearns Co., Ltd., v. United States*, 53 Fed. Cl. 446, 453 (2002).

Petitioner's brief will demonstrate that while this Court in *United States v. Locke*, *supra*, 471 at 105, intended to allow Congress latitude in regulating property rights, there are limitations. The 1985 *Locke* case did not contemplate that the Omnibus Act would overlap FLPMA's filing and forfeiture requirements. The *Locke* holding did not foresee, nor did it account for, the 1993 indefinite moratorium on applications for mineral patents.

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Forest Service mining claim regulations 36 CFR § 228, Bureau of Land Management surface management regulations 43 CFR § 3809 and Secretarial Order No. 3163.

*Locke* did not anticipate progressive BLM and Forest Service limitations and restrictions on mining and removal rights authorized under the 1872 Mining Laws and the Act of July 23, 1955, 30 U.S.C. 612. Most significantly, this Court in *Locke* did not anticipate that the DOI would use discretionary authority to administer the mining laws with summary administrative processes that diminish and terminate valid existing rights without Fifth Amendment due process.

5. Petitioner's brief will examine administrative processes that would enable owners of mining claims adversely affected in BLM and Forest Service proceedings to assert and to show entitlement to due process protection of valid existing rights.

Petitioner's brief will illustrate that where miners cannot relocate perfected mining claims, in lieu of an appeal, BLM forfeiture notices could easily inform miners of requirements to assert valid existing rights and processes for determination of the validity of the assertion.

## MINING CLAIM OWNERS DID NOT RECEIVE TIMELY AND CLEAR FIFTH AMENDMENT NOTICE OF THE OMNIBUS ACT'S FEE PAYMENT AND FEE WAIVER REQUIREMENTS

If this Petition is granted on this notice issue, Petitioner's brief will analyze:

1. Fifth Amendment procedural due process property guarantees for perfected mining claims with valuable mineral discoveries and for unperfected mining claims without mineral discoveries. The purpose of FLPMA was to eliminate stale or dead mining claims that are not recorded. The Omnibus Act summarily extinguishes active mining claims which are

carried on the BLM records, some of which are valid existing rights and many of which are being worked under BLM and Forest Service plans of operations.

Remedies will be examined that are available to owners of mining claims to relocate forfeited mining claims located on federal lands open to mining that are not available to owners of mining claims that cannot be relocated.

2. Fifth Amendment forfeiture time deadline and clarity notice requirements for forfeiture statutes such as FLPMA, 43 U.S.C. 1744, interpreted by this Court in *United States v. Locke*, *supra*, 471 US at 108-109. The two-year Indiana mineral interest lapse statute considered in *Texaco, Inc. v. Short, supra* 454 US 516, serve as an illustration:

> "In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Texaco, Inc. v. Short*, *supra* at 532.

This Court has held that three years is sufficient for a United States mining claim forfeiture statute, under the Fifth Amendment notice requirements:

> "Here, there can be no doubt that the Act's recording provisions meet these minimal requirements. Although FLPMA was enacted in 1976, owners of existing claims, such as

> appellees, were not required to make an initial recording until October 1979. This 3-year period, during which individuals could become familiar with the requirements of the new law, surpasses the 2-year grace period we upheld in the context of a similar regulation of mineral interests in*Texaco*. Moreover, the specific annual filing obligation at issue in this case is not triggered until the year after which the claim is recorded initially; thus, every claimant in appellees' position already has filed once before the annual filing obligations come due". *United States v. Locke*, *supra* 471 US at 108.

Contrastingly, a federal Indian heirship succession forfeiture statute that became effective the day it was signed into law is manifestly insufficient. *Hodel v. Irving*, 481 US 704, 733 (1987).

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The clarity and sufficiency of the Omnibus Act for providing Fifth Amendment notice to mining claim owners will be critically analyzed.

The Omnibus Act omits a deadline for filing fee waivers. The issuance of DOI's BLM regulations on August 30, 1994 established an August 31, 1994 through 1998 annual regulatory forfeiture deadline for filing fee waivers. Petitioner's mining claims were declared forfeited for failure to meet the complex and confusing regulatory requirements one-year later, in 1995.

Petitioner will critically analyze the applicability of the *Locke* case presumption that a prior filing under a Congressional Act shows knowledge of the Act's (here the Omnibus Act's) alternative fee payment or fee waiver

certification requirements. *United States v. Locke*, 471 US at 108. *Harlow Corporation, supra*, 135 IBLA 386. f.n. 5/.

> "That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands. The requirement of an annual filing thus was not so unlikely to come to the attention of those in the position of appellees as to render unconstitutional the notice provided by the 3-year grace period." *United States v. Locke*, 471 US 108-109.

In *Locke*, a prior timely annual filing had been made by the claimant, indicating his knowledge of the Act's annual filing requirements. In this case, Harlow had paid rental and Omnibus Act maintenance fee payments and was attempting to file a new and distinct instrument - a fee waiver certification - to comply with the Omnibus Act. (App.E-1-4).

Fifth Amendment notice contemplates that forfeiture statutes will provide plain and clear understanding of requirements to persons owning property affected by the statutes. The Fifth Amendment imposes no duty on United States citizens doing business with a federal agency to employ an attorney to gain an understanding of agency regulatory requirements that are supposed to be plain and clear.

The Omnibus Act presents property forfeiture notice complexities that were not present in either the *Locke* or *Texaco* cases. In the *Texaco* case the forfeiture statute established easily-understandable, relatively simple filing deadlines:

> "As a result, this is not a case in which individual notice of a statutory change must be given because a statute is sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations." *United States v. Locke*, *supra*, 471 US at 109 f.n. 16.

The Omnibus Act and BLM regulations contain a confusing, conflated combination of fee payment and fee waiver filing requirements that operate in conjunction with the 1872 Mining Act and FLPMA annual mining claim filing requirements.

To some extent, the notice deficiencies in the Omnibus Act are revealed by statistics. About seven-hundred thousand of one-million mining claims were forfeited within two years after the Act was signed. An indication of the Omnibus Act's complexity in determining its sufficiency is the enactment of 1998 Pub. L. 105-277, Oct. 21 1998, 121 Stat. 2081 amending the fee payment provisions of 30 U.S.C. § 28f, following this amendment, BLM issued maintenance fee waiver certification Form 3830-2, United States Department of the Interior Bureau of Land Management (February 2003), Form Approved OMB No. 1004-0114.[3] (App.D-11-13).

The statutory amendments and form clarified the fee waiver filing requirements of the Omnibus Act and BLM

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3. This form was not included in the record in this case. The form is offered to this Court to show the complexity of waiver requirements.

regulations. Obviously, the amendments and the form were required because the fee and waiver filing requirements were unclear.

Yet another factor is that the Omnibus Act involves the collection of fees payable to the United States. There are Government requirements and standards for administrative processes - such as billing statements - to collect recurring fees payable to the United States. DOI's compliance with the standards will be examined.

Agency responses to requests for information becomes an important part of the notice and fiscal collection process. The Petitioner was willing to pay or file a fee waiver and requested further information to understand how to do business with the DOI and BLM. This was information that should be made available to every citizen and particularly persons doing business with the agency. The DOI held that one of Petitioner's inquiries was vague. Petitioner made two requests for information with payments and received nothing in return. (App.E-1-4).

## VALID EXISTING RIGHTS SHOULD BE THE CONTROLLING EQUITABLE ESTOPPEL CRITERIA IN MINING CLAIM CASES

Petitioner will not challenge DOI IBLA authority to apply equitable estoppel principles in mining claim cases, even though Section 2, Article III of the Constitution extends Judicial Power to all cases in Law and Equity arising under the Constitution and the Laws of the United States.

Although no statutory authority can be found providing the Secretary of the DOI with jurisdiction in equity cases, it is apparent that mining claim owners can receive convenient and

low-cost equitable relief by the DOI in mining claim cases, provided the correct valid existing rights criteria is applied.

If this Petition is granted on the equitable estoppel issue, Petitioner's brief will analyze:

1. Balancing the policies of the DOI for forfeiture and diminishment of valid existing rights against statutory and constitutional policies for protection of valid existing rights. The economic loss of forfeited valuable mineral deposits, profits and investmen s will be weighed in with the policies against forfeiture of valid existing rights:

> *** we have never held that the Government can extinguish a vested property interest that has been legally held and actively maintained for more than 20 years merely because the private owners relied on advice from agency personnel concerning a poorly worded statutory deadline and consequently missed a filing deadline by one day.*** Justice O'Connor, Concurring, *United States v. Locke*, *supra*, at 112.

2. Other estoppel considerations, such as processes for persons to assert and the Government to determine valid existing rights; requirement or entitlement, in consideration of fees paid, to receive recurring annual notice of filing or payment deadlines for maintenance fees or fee waivers; requirements to answer requests for information and the consequences of BLM's failure to provide information.

## CONCLUSION

Granting this Petition for writ of certiorari will serve constitutional, public and commercial interests.

Respectfully submitted,

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